

# EXHIBIT 5

**In The Matter Of:**

***MICROSOFT CORPORATION***

***v.***

***MOTOROLA INC., et al.***

---

***GREGORY LEONARD, Ph.D. - Vol. 1***

***June 24, 2013***

---

***HIGHLY CONFIDENTIAL***

**MERRILL CORPORATION**

**LegalLink, Inc.**

135 Main Street  
4th Floor  
San Francisco, CA 94105  
Phone: 415.357.4300  
Fax: 415.357.4301

HIGHLY CONFIDENTIAL  
GREGORY LEONARD, Ph.D. - 6/24/2013

Page 39

1 MR. CANNON: Object to the form of the 09:53  
2 question. 09:53

3 THE WITNESS: I think if the opening offer was 09:53  
4 a take-it-or-leave-it offer, you know, that objectively 09:53  
5 was above the RAND level, then that's possible that 09:54  
6 that -- and even that, you know, you got to be careful 09:54  
7 because, you know, what is -- you know, what did they 09:54  
8 know about what RAND was or wasn't. But, you know, 09:54  
9 maybe that would be something you'd want to look at. 09:54

10 But otherwise, an opening offer, especially in 09:54  
11 a negotiation like this, where there's going to be 09:54  
12 probably a lot of complex terms in the ultimate 09:54  
13 agreement, which bring you very far from the opening 09:54  
14 offer, there's a lot of information exchanged that 09:54  
15 brings you very far from the opening offer, and what you 09:54  
16 knew then. You know, the whole cross-licensing issue. 09:54  
17 It's just that a lot of things are going to happen in 09:54  
18 between an opening offer and a final negotiated rate. 09:54

19 And in that context, the opening offer is -- is 09:54  
20 not going to play a huge role in where you end up, as 09:54  
21 long as, again, people are engaged in their RAND 09:54  
22 negotiation. 09:54

23 BY MR. PRITIKIN: Q. Suppose the opening offer 09:54  
24 is blatantly unreasonable, would that be consistent with 09:55  
25 good faith? 09:55

HIGHLY CONFIDENTIAL  
GREGORY LEONARD, Ph.D. - 6/24/2013

Page 40

1 MR. CANNON: Object to the form of the 09:55  
2 question. 09:55

3 THE WITNESS: Again, I don't think that by 09:55  
4 itself. You know, if -- I think what would -- it 09:55  
5 depends what happens next. Because, of course, it's 09:55  
6 hard to decide whether it's unreasonable. And if, you 09:55  
7 know, Microsoft came back and said -- so let's say 09:55  
8 Motorola had, you know, proposed an extremely high 09:55  
9 royalty rate, and if Motorola -- if Microsoft came back 09:55  
10 and said, you know, that's just completely ridiculous 09:55  
11 and here's the five reasons why, and Motorola said, 09:55  
12 okay, you're right and then things went from there, then 09:55  
13 I think that that -- you know, you're going to -- you 09:55  
14 could very well end up with a RAND rate. And the 09:55  
15 opening offer really has nothing to do with the outcome. 09:55

16 BY MR. PRITIKIN: Q. Let's ignore everything 09:55  
17 that happens after the opening offer. And I want you 09:55  
18 to -- for purposes of this next line of questions -- to 09:55  
19 focus just on the opening offer and tell me whether you 09:55  
20 think the conduct is consistent or inconsistent with 09:56  
21 good faith. Let's suppose that the patent owner puts 09:56  
22 forward an offer that is so high that it is blatantly 09:56  
23 unreasonable, do you think that by itself is enough to 09:56  
24 be -- to show bad faith? 09:56

25 MR. CANNON: Object to the form of the 09:56

HIGHLY CONFIDENTIAL  
GREGORY LEONARD, Ph.D. - 6/24/2013

Page 41

1 question. 09:56

2 THE WITNESS: First of all, that's not 09:56

3 consistent with the facts here. So it's a hypothetical. 09:56

4 Again, I think I would want to look at what 09:56

5 happens when the -- the counterparty calls them on that. 09:56

6 Because, you know, again there are a lot reasons why you 09:56

7 could have a rate that seems -- or even is unreasonable, 09:56

8 there could be a typo in the letter, for God sake. 09:56

9 There could be -- you know, you're such a rush again to 09:56

10 do it that you don't think about it very hard. There's 09:57

11 a lot of reasons why that number could seem 09:57

12 unreasonable. 09:57

13 And the question is really whether that ends up 09:57

14 kind of being the -- a take-it-or-leave-it offer, for 09:57

15 instance. Or that you -- that the licensor sticks to an 09:57

16 unreasonable number throughout the course of a 09:57

17 negotiation, despite the arguments that have been put to 09:57

18 it as to why that's unreasonable. So I would really 09:57

19 want to look forward. I think that's pretty hard to 09:57

20 infer bad faith just from that one thing, which is the 09:57

21 opening offer. 09:57

22 BY MR. PRITIKIN: Q. Even an opening offer 09:57

23 that is so high that it is blatantly unreasonable, you 09:57

24 would not infer bad faith just from that; is that 09:57

25 correct? 09:57

HIGHLY CONFIDENTIAL  
GREGORY LEONARD, Ph.D. - 6/24/2013

Page 42

1 A. Again, what if it was a mistake? 09:57

2 Q. It wasn't a mistake in this case, was it? 09:57

3 A. I don't think that this was so blatantly -- you 09:57

4 know, I've explain why I think that they came up with 09:57

5 this number. And I don't think there's any evidence, 09:58

6 again, that Motorola wouldn't have responded to 09:58

7 arguments about why that number was -- was too high. 09:58

8 Q. Let's leave aside the circumstance where 09:58

9 there's a typographical error. 09:58

10 Is it your opinion that in making an opening 09:58

11 offer that is so high that it's blatantly unreasonable, 09:58

12 that that in and of itself would not be evidence of bad 09:58

13 faith? That you always want to look at the subsequent 09:58

14 conduct? 09:58

15 A. I think just as a general matter, it would help 09:58

16 to take a look at that next round of -- you know, is 09:58

17 there some level, you know, beyond which -- here again, 09:58

18 people can just be wrong too. I mean that's the other 09:58

19 issue here. People can just simply make a mistake or be 09:58

20 incorrect about things. 09:58

21 And part of a negotiation is correcting 09:58

22 people's mistakes or giving them more information. And 09:59

23 so that's why it seems to me it's quite important to 09:59

24 look at what happens throughout the negotiation. And 09:59

25 that's what really allows you to see whether people are 09:59

HIGHLY CONFIDENTIAL  
GREGORY LEONARD, Ph.D. - 6/24/2013

Page 43

1 saying, you know, I'm going to respond to a reasonable 09:59  
2 argument about why my patent isn't worth very much. If 09:59  
3 that in fact is true. 09:59

4 Or if they don't do that, if they maintain a, 09:59  
5 you know, significant demand when there's lots of 09:59  
6 evidence that their patent wasn't worth very much, then 09:59  
7 that's -- that's a different story. But that's the 09:59  
8 think you learn over the course of a negotiation, not 09:59  
9 just from an opening offer. 09:59

10 Q. You know, let me give you a hypothetical. 09:59  
11 Suppose that Motorola's strategy here was to set the 09:59  
12 state for securing injunctions against Microsoft by 09:59  
13 putting forth offers that it knew were unreasonable and 09:59  
14 that Microsoft would not accept. If that was the 09:59  
15 strategy, would you consider that to be inconsistent 09:59  
16 with good faith? 10:00

17 A. I'm sorry. You're going to have to re-read the 10:00  
18 question. 10:00

19 MR. PRITIKIN: Could you read it back, please. 10:00

20 (Record read as follows: "Suppose that 10:00  
21 Motorola's strategy here was to set the state for 09:59  
22 securing injunctions against Microsoft by putting forth 09:59  
23 offers that it knew were unreasonable and that Microsoft 09:59  
24 would not accept. If that was the strategy, would you 09:59  
25 consider that to be inconsistent with good faith?") 09:59

HIGHLY CONFIDENTIAL  
GREGORY LEONARD, Ph.D. - 6/24/2013

Page 108

1 determination. 11:59

2 BY MR. PRITIKIN: Q. And for purpose of your 11:59

3 analysis here, did you assume that a blatantly 11:59

4 unreasonable offer to an implementer could be a 11:59

5 violation of the RAND commitment all by itself? 11:59

6 MR. CANNON: Object to the form of the 11:59

7 question. 12:00

8 THE WITNESS: I don't know if I thought about 12:00

9 things in those terms. What I thought -- again, what I 12:00

10 did was I looked at the -- the situation and I looked at 12:00

11 what Motorola did. And it seems to me, based on again 12:00

12 everything I'm describing here, that that was a 12:00

13 reasonable thing to do in that context and situation. 12:00

14 Whether there's some other hypothetical situation where 12:00

15 an opening offer wouldn't be consistent with, you know, 12:00

16 engaging in a RAND negotiation that was unreasonable or 12:00

17 blatantly unreasonable, that would be a different 12:00

18 situation. But that's not this one. 12:00

19 BY MR. PRITIKIN: Q. Is it your opinion that a 12:00

20 blatantly unreasonable offer all by itself is something 12:00

21 that the -- as a matter of economics, that the owner of 12:00

22 standard-essential patents can make consistent with its 12:00

23 RAND commitment? 12:00

24 MR. CANNON: Object to -- object to the form of 12:00

25 the question. 12:00



HIGHLY CONFIDENTIAL  
GREGORY LEONARD, Ph.D. - 6/24/2013

Page 109

1 THE WITNESS: Well, again, I mean it's not the 12:01  
2 situation here. But in some general hypothetical, I 12:01  
3 think again it would depend even there on the context of 12:01  
4 what was -- what was going on. 12:01

5 BY MR. PRITIKIN: Q. So it be fair to say that 12:01  
6 in some circumstances an offer that you would 12:01  
7 characterize as blatantly unreasonable, because it was 12:01  
8 so high, might be fine, in your opinion? 12:01

9 A. Again, if it didn't lead to, in -- you know, in 12:01  
10 a sense, getting in the way of ultimately getting to a 12:01  
11 RAND royalty, since that's the goal of this entire 12:01  
12 enterprise, it would seem to me that that would be a 12:01  
13 situation where it -- you know, it's not in relation -- 12:01  
14 it's -- it's not really relevant or an issue. 12:01

15 If on the other hand it was a blatantly 12:01  
16 unreasonable offer that somebody stuck to through a 12:01  
17 negotiation, as I testified before, that that might -- 12:01  
18 than that would be a different story. But that's, 12:02  
19 again, not the situation we have here. 12:02

20 Q. Do you think the opening offer in the RAND 12:02  
21 context is meaningless? 12:02

22 A. I think it depends again entirely on the 12:02  
23 overall context. In a situation like this, where most 12:02  
24 of the licensing agreements that Motorola, for instance, 12:02  
25 has entered into is very complex with lots of things 12:02

HIGHLY CONFIDENTIAL  
GREGORY LEONARD, Ph.D. - 6/24/2013

Page 126

1 not in my area of expertise. 12:25

2 Q. And you're not suggesting or implying that 12:25

3 Microsoft did anything wrong by filing a lawsuit when it 12:25

4 did, are you? 12:25

5 A. I'm not -- either way, again lawful, unlawful, 12:25

6 legally entitled, not legally entitled, that's not 12:25

7 opinions that I am reaching. I'm just making the simple 12:25

8 point that, you know, if they let it play out, then 12:25

9 first of all, it might have actually gotten into an 12:26

10 agreement. Second of all, it would at least allow us to 12:26

11 have more information on -- on -- on what -- obviously 12:26

12 what would have happened. 12:26

13 Q. In reaching your conclusions in this case, did 12:26

14 you assume that Microsoft had some obligation to 12:26

15 negotiate in good faith with Motorola? 12:26

16 A. I don't think that that turned out to be 12:26

17 important for any of my opinions. I think I said 12:26

18 earlier, though, that in a RAND context that the 12:26

19 licensee also I think should -- and again, it's not 12:26

20 legal, it's just my view as an economist. But, you 12:26

21 know, it does take two to tango. And so they should -- 12:26

22 they should have to negotiate in good faith as well. 12:26

23 Q. And so the fact that Microsoft filed the 12:26

24 lawsuit and did not engage in negotiations before filing 12:26

25 the lawsuit, did that bear any part in your analysis as 12:26